





## Meddahi (Migration) [2024] AATA 124 (19 January 2024)

### DECISION RECORD

|                                   |                                                                                                     |
|-----------------------------------|-----------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>                  | Migration & Refugee Division                                                                        |
| <b>APPLICANT:</b>                 | Mr Sid Ali Meddahi                                                                                  |
| <b>REPRESENTATIVE:</b>            | Ms Diana Xidan Tong (MARN: 9359088)                                                                 |
| <b>CASE NUMBER:</b>               | 1918186                                                                                             |
| <b>HOME AFFAIRS REFERENCE(S):</b> | BCC2017/322241                                                                                      |
| <b>MEMBER:</b>                    | Jennifer Cripps Watts                                                                               |
| <b>DATE:</b>                      | 19 January 2024                                                                                     |
| <b>PLACE OF DECISION:</b>         | Sydney                                                                                              |
| <b>DECISION:</b>                  | The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa. |

Statement made on 19 January 2024 at 5:42pm

### CATCHWORDS

*MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship and nature of commitment – relationship ceased, sponsorship withdrawn and divorce finalised – application for review of refusal of related visa application in progress – partner visa with new wife in progress – anonymous adverse information cannot be corroborated and not relied on – request for referral for ministerial consideration not accepted – applicant can apply directly – decision under review affirmed*

### LEGISLATION

*Migration Act 1958 (Cth), ss 5F(2), 65, 375A*

*Migration Regulations 1994 (Cth), Schedule 2, cl 820.211(2)(a), 820.221*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 20 January 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The subclass 820 visa was refused because the applicant did not satisfy cl 820.211(2)(a) because the delegate was not satisfied that the applicant and sponsor (the parties) were in a genuine married relationship as it is described in s 5(2) of the Act. The applicant's related subclass 801 partner visa application was refused in the same decision record, essentially on the basis that the subclass 820 visa had been refused. This is relevant because a subclass 801 permanent partner visa cannot be granted if the applicant does not meet the primary criteria, which includes that they must have been granted and hold a subclass 820 visa. The refusal of the applicant's subclass 801 visa is the subject of a separate Tribunal review application, matter number 1919281.
4. The applicant lodged two review applications; one for the refusal of his temporary partner visa (subclass 820); and one for the refusal of his permanent partner visa (subclass 801). At the request of the applicant the hearings relating to the refusal of his subclass 820 temporary partner visa and subclass 801 permanent partner visa were combined.
5. The applicant appeared before the Tribunal by MS-Teams video on 19 January 2024 to give evidence and present arguments. The applicant's wife, Heidi Day, appeared at the hearing but it was not necessary for her to give oral evidence. The applicant's representative, Ms Tong, attended the hearing and assisted both the applicant and the Tribunal with oral submissions.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

### CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant meets the time of decision criteria relating to his subclass 820 visa refusal: 820.221(2) of Schedule 2 to the Regulations. At the time of application, the applicant must be the spouse or de facto partner of an Australian citizen, Australian permanent resident or eligible New Zealand citizen.
8. The applicant must continue to meet the requirements of the applicable subclause (relevantly in this case, 820.211(2)), or meet the requirements of cl 820.221(2) or (3) at the time of decision, to be able to meet the requirements of cl 820.221 at the time of decision. Essentially, this requires the applicant to continue to be the spouse or de facto partner of the sponsoring partner at the time of decision unless any of the other 820.221 subclauses apply.
9. There are other cl 820.221 sub-criteria under which an applicant may be eligible to claim an exception to having to meet cl 820.221(2): these include, in summary, where the sponsor

has died; where the sponsor has committed family violence against the applicant or a member of their family unit; or where there are custody orders that have been made under the *Family Law Act 1975* for joint custody, access by a court, a residence or contact order or where an applicant has child maintenance obligations. It was discussed with the applicant and his representative, and confirmed, at the Tribunal hearing that the applicant is not claiming to meet any of the other cl 820.221 sub-criteria.

### **Whether the parties are in a spouse or de facto relationship**

10. Clauses 820.211(a) and 820.221(2) require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims that at the time of application he was the spouse of the sponsor who is an eligible New Zealand citizen
11. The subclass 820 partner visa application was made on 20 January 2017 on the basis of the applicant's claim that he and the sponsor were spouses, as it is defined in s 5F of the Act. In March 2020 the relationship ceased, a factual matter not disputed by either the applicant or sponsor.
12. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d) of the Act.
13. In forming an opinion about these matters in s 5F of the Act, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the matters contained in reg 1.15A(3)(a)-(d) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

### **Are the parties validly married?**

14. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

### **Are the other requirements for a spouse relationship met?**

15. The Tribunal has had considered evidence on both the Department and Tribunal files covering the period from the time of application up to when the relationship ceased, in March 2020. The Tribunal has had regard financial aspects of the parties' relationship, the nature of their household, the social aspects of the parties' relationship and the nature of their commitment to each other and makes the following findings.
16. Financial aspects of the relationship: reg 1.15(3)(a)
17. The parties leased both residential and commercial properties in joint names and were equal share owners of a Café. Relating particularly to the business they had, the Tribunal is satisfied that they had joint liabilities, legal obligations, pooled their financial resources and shared household expenses.

18. Nature of the household: reg 1.15(3)(b)

19. The parties have both had previous marriages or relationships. The sponsor has two sons from a previous relationship and the evidence indicates that the applicant, while the parties were married and cohabiting, shared joint responsibility with the sponsor for the care and support of the children, who were about 16 and 18 when the relationship ceased. The sponsor said in her relationship statement that the applicant and the two boys used to play Xbox, watch soccer on the television, go to the beach together, and that the applicant taught her eldest son how to drive.
20. At the hearing the applicant gave evidence that the elder of the two boys worked for him at his barber shop and that he organised with a friend of his for the younger of the two brothers to work as a tiler.
21. The Tribunal is satisfied that the parties' living arrangements are consistent with what may be expected of a married couple in the parties' circumstances.

22. Social aspects of the relationship: reg 1.15A(3)(c)

23. The Tribunal has had regard to the evidence in support of how the parties represented themselves to others, the opinions of friends and acquaintances about the nature of the relationship and the joint activities the parties enjoyed up until the time the relationship ceased. A large number of Form 888 statutory declarations were provided at the time of application, and to the Tribunal, in which the declarants give their opinions that they consider the relationship to be genuine.
24. Many photographs of the parties together and with others have been provided and show that the parties socialised together and with others.
25. The Tribunal is satisfied that the parties represented themselves to family and friends, and socialised with them together, as a married couple.

26. Nature of the parties' commitment to each other: reg 1.15(3)(d)

27. The parties met in August 2016 at Umina Beach. They parties married each other in a traditional Islamic ceremony in Bankstown on 25 September 2016. The parties were also legally married and the marriage registered in the state of New South Wales on 24 October 2016.
28. In total the parties were together for about three and a half to four years, from the time they met until March or April 2020. The applicant initiated a divorce and the final divorce order was made by the Court in 2021.
29. The relationship appears not to have ended on good terms when it ceased in March 2020. The sponsor sent written notice that she was withdrawing the sponsorship in around April or May 2020.

30. Other information

31. The applicant has remarried and applied for a subclass 309 partner visa on the basis of his relationship with his wife and sponsor, Heidi May. They have a daughter together who is nearly two years of age. Both the applicant's wife and daughter are Australian citizens. The Tribunal understands that the 309 partner visa application has not progressed since the application was made on 28 October 2022.

**32. Non-Disclosure Certificate issued under s 375A of the Act**

33. The Tribunal informed the applicant of adverse information that is the subject of the information contained in the folios specified in the non-disclosure certificate (NDC) that was issued by a delegate of the Minister on 23 April 2020. It was explained to the applicant that, under s 375A, the Tribunal cannot disclose the information because it would be contrary to the public interest. The applicant was told that certain information, that is contained in the folios specified in the NDC, had been provided in the form of dob-ins (which was explained for the benefit of the applicant as he had not come across the term before).
34. The reason it would not be in the public interest to disclose the information was included in the NDC, as follows:
35. 'it may endanger the life or physical safety of a person, and where information was provided 'in confidence', the provider of the information has not consented to the disclosure of the information to the review applicant'
36. The NDC was signed and dated by a delegate of the Minister for Home Affairs and Secretary of the Department of Home Affairs.
37. The Tribunal carefully considered the information contained in the folios specified in the NDC to decide whether the information should be relied on and whether it is relevant to the issue on review. The answer to both these questions is 'no' and the applicant was told this at the hearing.
38. Early in the Tribunal hearing, the applicant offered in his oral evidence that a friend of his called him not long after the relationship with the sponsor had ceased and told him that certain people associated with the sponsor, and possibly the sponsor herself, had been sending 'emails saying there was domestic violence'. The applicant said it was 'all a lie'. He said he tried to understand why she was saying there had been domestic violence, but that the sponsor 'didn't explain anything, didn't say anything, ignored everything'. The applicant said that for a few weeks leading up to the time the relationship ceased he had not been happy and that they (the parties) 'couldn't fix it'. He said they sat down with the sponsor's sons and the applicant asked them what they thought about him being married to their mother because he 'would like their opinion'. The applicant said that he had, up until that time, thought his relationship with the boys was good but that they responded negatively to his question. The applicant expressed her wish that the boys be left out of the decision to end the relationship.
39. The applicant was informed that the Tribunal could disclose the 'essence' of the information and he was told that the information was provided anonymously and the subject matter was generally consistent with what the applicant himself had said at earlier in the hearing, as it appears in the above paragraph. The Tribunal told the applicant that as the 'dob-ins' or allegations were received anonymously that they were not considered to be reliable evidence; that is, the information could not be corroborated. The applicant was told that the Tribunal cannot know for sure who sent these allegations by email, what motive they may have had for sending the emails and whether for example it was one person or several different people who sent the emails, and for those reasons the Tribunal was giving no weight to the information and would not be relying on it for the purpose making a decision on the review for matter number 1918186 or 1919281. Nevertheless, as the NDC had not been provided to the applicant prior to the combined Tribunal hearing, an undertaking to send, and the Tribunal did send, the NDC to the applicant's representative after the hearing for them to comment on its legal validity. The Tribunal was told that this was merely a formality because the Tribunal was not intending to rely on any of the information that the NDC relates to.

40. **Conclusion**

- 41. At the time of application and up until around the time the relationship ceased in early 2020, the Tribunal is satisfied that the parties had a mutual commitment to a shared life to the exclusion of all others, the relationship was genuine and continued until it ceased and the parties lived together during the relationship: s 5F(2) of the Act.
- 42. However, at the time of the Tribunal's decision, the married relationship must be 'genuine and continuing' unless any of the exceptions in cl 820.221, already detailed above in this decision, are met. The relationship ceased in March 2020 and the parties divorced in 2021.
- 43. On the basis of the above, the Tribunal is not satisfied that the requirements of s 5F(2) are met at the time of this decision.
- 44. The applicant has made no claim, nor has he provided any evidence indicating that he would meet any of the cl 820.221 sub-criteria. Therefore the applicant does not meet cl 820.221 of Schedule 2 to the Regulations.
- 45. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

46. **Ministerial**

- 47. It was requested by the applicant that the Tribunal refer his matter to the Minister for Home Affairs. The Tribunal has considered the request, but has decided not to refer the matter to the Minister for Home Affairs. The applicant has a decision made by the Tribunal and may, if he chooses to do so, apply to the Minister of his own accord.

**DECISION**

- 48. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Jennifer Cripps Watts  
Senior Member



## **ATTACHMENT - Extract from Migration Regulations 1994**

### **1.15A Spouse**

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).